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The Legal Character of Sino-African Tied Aid: Cunning Fox or Wise Dragon?

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Sino-African trade has seen a fifty-fold increase in the years 1999 to 2008. However, China holds not a single Free Trade Agreement (FTA) on the African continent, while other major trading partners of African economies rely on an extensive framework of trade and economic partnership agreements. So what is the legal basis of Sino-African trade if it is not secured by conventional trade agreements? Given the large impact of China on the African market, does the wise Asian dragon rather prove to be a cunning fox in disguise? Is engaging in economic relations outside of the trodden paths of free trade a cunning scheme or is China's somewhat unorthodox support of the African economies in fact a sustainable and wise strategy for economic development?

The aim of this paper is to qualify the legal character of the Chinese economic involvement particularly in the infrastructure and services sectors on the African continent. The Chinese involvement is often based on state loans provided by the Chinese Exim bank in return for oil or other commodities, and it is largely unknown what legal rights and duties are attached to these kinds of agreements. Outlining possible implications of the legal character of the contracts based on the so-called Angola-Model provides the basis for a discussion on the policy-space in the Sino-African economic relationship and on more fundamental, systemic questions concerning the structure of international trade law.

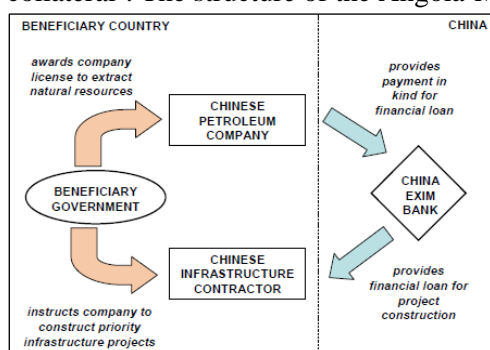
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2. Legal Characterisation of the Sino-African Economic Relationship

Contrary to most other major trading partners of African countries, China pursues a strict non-interference policy in relation to internal conflicts and human rights abuses¹. Acknowledging balance-of-payments constraints of its African partners, it is also willing to accept alternative payment arrangements, such as barter² or technology transfers³.

Trading based on the barter system has a long history on the African continent and is still prevalent⁴. Chinese officials, thus, seem to have found a common language with African governments when negotiating over commodity backed state loans. While Western countries and companies will expect hard currency in return for their investments or loans⁵, Chinese officials are happy to accept alternative ways of payment. At first glance, this approach seems to correspond to the Chinese interest in commodity supply, as well as the African interest in access to finance and strengthen the economic infrastructure⁶.

These resource-backed financing agreements in Africa have become known as the ‘Angola Model’⁷. The term is derived from the long history of Chinese investment in Angola. The model describes the typical concessional loan to African governments, of which the China Exim Bank is the sole lender. Such loans are given for infrastructure, social or industrial projects for which Chinese contractors must be awarded and in principle no less than 50 percent of the projects’ procurement must come from China. The projects financed by this concessional loan are determined and decided upon by the local government⁸. In securing the loan, China typically secures accepts oil or other commodities as collateral⁹. The structure of the Angola-Model can be described as follows¹⁰:



Source: World Bank (2008).

¹ cf. DAVIES, M. (2008), p. 57.

² ‘Barter’ describes an alternative form of trade, independent from the exchange money. Normally, rather than goods for money, goods are exchanged for other goods or for natural resources. This system is still prevalent in regions where money-transfers are complicated and/or where the value money is less reliable.

³ BITZINGER, R. A. (1992), p. 92.

⁴ cf. AZARYA, V. AND CHAZAN, N. (1987), p. 117 and p. 127.

⁵ cf. TEUNISSEN, J. J. (2005).

⁶ cf. PANNELL, C. W. (2008), p. 711.

⁷ DAVIES, M. (2008), p. 53.

⁸ See China Exim Bank [Online].

⁹ DAVIES, M. (2008), p. 53-4.

¹⁰ FOSTER, V., BUTTERFIELD, W., CHEN, C. AND PUSHAK, N. (2008), p. 43.

In relation to the legal characterisation, the extraordinary aspect of these contracts is the fact that the loans are only indirectly provided by the China Exim Bank by paying the Chinese company for completing the projects desired by an African government.

Typically, state loans are based on a contract between two subjects of public law and part of public international law. At first sight, the contracts attached to the Sino-African state loans in the Angola-Model seem part of private law, because the Chinese company as the final receiver of the loan is not a subject of public law. However, this impression is disputed by Kaplinsky et al.:

The ability of Chinese firms to invest in fragile states – such as Angola, the DRC, Sudan and Sierra Leone – is almost certainly linked to the political economy of the Chinese corporate sector. Many Chinese firms investing [in Africa] are partly or wholly state-owned, and reflect the desire of the Chinese government to build a long-term presence in a resource-rich continent.¹¹

Based on this view, it could be argued that the China Exim Bank being wholly state-owned, acting in the interest and on behalf of the Chinese government and dealing with a state-owned Chinese company working in Africa, evidently in the interest of the Chinese and the African governments, too, accounts for *de facto* public character of the contracts. The contracts are basically part of an agreement between two subjects of public international law, the African state and China.

2.1 Review of Previous Debates: Public or Private International Law?

The Sino-African investments based on the Angola-Model correspond more or less with early so-called economic development agreements¹². Although today's Sino-African investments are more sophisticatedly formalised and bundle more obligations and concessions together, the basic approach is the same: development assistance by way of investments and tech transfer in return for economic benefits in the form of commodity supplies.

In contrast, the circumstances are somewhat different in the case of Sino-African investment agreements: While Northern MNCs clearly are a subject of private law and are neither controlled nor owned by a government, the Chinese MNCs are *de facto* entirely state-owned and –controlled. The main arguments against the public character of the economic development agreements therefore do not apply to the case of Sino-African investment agreements. Consequently, reviewing the debate about the public or private character of such contracts in the specific case of China would be worthwhile.

3. The Implications of Private International Law in the Angola-Model

The Angola-Model consists of mainly three areas of law: 1) the official state-treaty, which is part of public law, 2) the individual contracts, e.g. between Chinese companies and African workers or

¹¹ KAPLINSKY, R., MCCORMICK, D. AND MORRIS, M. (2007), p. 41.

¹² See PAASIVIRTA, E. (1990).

vendors, which clearly are of a private nature, and, finally, 3) the parts of the Angola-Model where both ways can be argued.

3.1 Parts of the Angola-Model relevant for Private Law

Generally, all areas of the Angola-Model involving a subject of private law (such as a company, a corporation, a natural person) fall under the umbrella of private law¹³. Consequently, the contracts between a Chinese company and the China Exim Bank or the respective African government arguably can be a case of private law. The relevant question for the distinction between private and public law is, thus, the nature of the subject involved in an agreement based on the Angola-Model.

In favour of the private character of the contracts between the China Exim Bank and the Chinese contracting companies working for the African government speaks the fact that these companies generally are set up as and acting like a subject of private law, pursuing their own agenda. Of course one has to take into account that this agenda is closely linked to the official policy of the Chinese government and in case of an economic loss, the MNCs would certainly be backed up by the Chinese authorities. Nevertheless, the companies are *de jure* a subject of private law.

Another way of arguing in favour of the private character of these contracts and agreements would be through the content and aim of the latter: The contracts between the China Exim Bank and Chinese companies, as well as between African governments and Chinese companies, essentially regulate and define the terms and conditions for the respective assignment¹⁴. There has not been a case of enforcement of such a contract by the courts of the host country so far, however, in theory this would be possible in the event of a dispute over the execution of the assignment and would provide proof for the private character of the contract.

3.2 Conflicts of Interest: ODA, Political Power and Market Access

If the legal character of the contracts between the China Exim Bank and the Chinese companies is considered to be of private nature, then the implications for both the company and the host country are negligible as they correspond with the normal implications of a typical legal contract under private international law.

However, in the case of the contracts between Chinese companies and the African government, implications – or at least questions – arise if private law applies. Generally, the nature of the contracts with Chinese companies is either a concession to extract and export commodities or an assignment to build or provide a certain service or part of the infrastructure according to the terms and conditions set up by the Angola-Model framework-treaty. The contracts with the extracting companies are of no

¹³ cf. HORWITZ, M. J. (1982); ALVAREZ, J. E. (2010).

¹⁴ cf. MANIRUZZAMAN, A. F. M. (2001).

further interest in this case, as they usually (except for the Barter trading system) tend to correspond with the *usus* in this area. The contracts with the companies that have a specific assignment in the infrastructure or services sector of the host country, however, skate on thin ice.

These contracts – being part of the Angola-Model – and the assignments for the Chinese companies attached, are generally listed under ODA on the Chinese side. However, ODA refers to transactions which are ‘administered with the promotion of the economic development and welfare of developing countries as its main objective’, concessional in character, and which ‘convey a grant element of at least 25 percent’¹⁵. Financing or building infrastructure and other public procurement-related projects may also be considered ODA if they meet the guidelines established by the OECD and/or the respective national legislation.

The individual contracts with Chinese companies based on the Angola-Model are not restricted to financial transactions (which is the most typical feature of ODA), but contain a specific assignment in the infrastructure or services sector. Although the majority of these projects are rightly described as typical ODA, some of them will not meet the guidelines established by the OECD and traditional major lending states¹⁶.

The problem can be illustrated with an example:

The Angolan government is using the state loan granted by the Chinese government in an Angola-Model arrangement for building a new palace for the president. This highly prestigious project is carried out by the Chinese contractor and does not only serve the president’s welfare but is intended to secure him the next elections by demonstrating his power and wealth to the people.

Such a project would not qualify as ODA under the traditional viewpoint of the major lending partners, as it is not intended to promote development, cannot be considered infrastructure, and is located in a highly sensitive area of local politics and power structures. Also, knowing that the Chinese state loan can be used for any possible project considerably weakens the incentive to invest into sustainable, long-term (and less visible) development projects as required by other lending partners.

4. The Implications of Public International Law in the Angola-Model

The general rule for the distinction between private and public law is the nature of the legal subject in an agreement. If one of the parties is not a subject of public law (generally restricted to states and international organisations), the legal character of the agreement is attributed to private law¹⁷.

¹⁵ OECD DAC (2008) *Is it ODA?*, fact-sheet [Online], Available: <http://www.oecd.org/dataoecd/21/21/34086975.pdf> (Accessed: January 12 2011).

¹⁶ HOFMANN, K. (2006), p. 5.

¹⁷ cf. ALVAREZ, J. E. (2010).

However, with the rise of MNCs and their growing impact as global players, the question of whether or not the public character should be extended to MNCs has been debated controversially. In addition, the so-called ‘economic development agreements’, which share great similarity with the legal framework attached to the Angola-Model, have been attributed to the sphere of public law by a considerable number of scholars¹⁸. However, there is no consensus yet on the legal character of MNCs and of ‘economic development agreement’-like treaties¹⁹. Therefore, as long as global consensus is missing, the old rules of distinguishing private and public law still apply.

In the particular case of the Angola-Model, two specific characteristics differ from the general problems discussed in the literature:

- 1) The Chinese MNCs – particularly the ones active on the African continent and linked with the Angola-Model – are *de facto* state owned in the majority of the cases. Thus, contrary to other MNCs, the legal character of the corporations can be disputed, as they tend to pursue the official strategy of the Chinese government and are owned by Chinese government officials, or the government itself. Consequently, it can be argued, that they rather have the character of a state office than the character of a private company²⁰.
- 2) Furthermore, an important difference to the former ‘economic development agreement’ is the fact that the Angola-Model is based on a framework-treaty between the two states concerned. This framework-treaty has public character and includes – as far as can be understood from what the Exim Bank states and what is generally known²¹ – all the relevant aspects of the agreements based on the Angola-Model. Thus, depending on the depth of the framework-treaty, this state-treaty already includes names of corporations, amounts of finance and specific assignments to Chinese companies. Consequently, these particular assignments and agreements fall under the umbrella of public law as far as they are mentioned in the framework-treaty.

Scholars have not yet reached consensus on the legal implications of the particularities of Chinese MNCs. This paper argues, however, that the particularities of the Sino-African case are reason enough to discuss the legal implications if the Chinese MNCs were to be considered a subject of public law.

4.1 Parts of the Angola-Model relevant for Public Law

Depending on the content of the framework-treaty between Chinese and African governments, parts of the Angola-Model based agreements are directly governed by public law, and other parts are only so in an indirect way. The obviously public part of the Angola-Model is included in the framework-treaty. Disputed is the application of public law to the contracts and agreements between Chinese companies and corporations and the China Exim Bank or the respective African government²².

¹⁸ PAASIVIRTA, E. (1990), p. 93.

¹⁹ cf. ALVAREZ, J. E. (2010); PAASIVIRTA, E. (1990); HORWITZ, M. J. (1982).

²⁰ On the ownership structure cf. RALSTON, D. A., TERPSTRA-TONG, J., TERPSTRA, R. H., WANG, X. AND EGRI, C. (2006); on the corporations active on the African continent cf. ZWEIG, D. AND JIANHAI, B. (2005).

²¹ cf. China Exim Bank on the loan agreement for concessional loans [Online].

²² see previous Chapter.

4.2 Legality of the ‘Public’ Aspects in the Angola Model

Generally, it is not known whether the contracts based on the Angola Model are consistent with public international law in every detail. Concerns have been raised particularly in reference to human rights, labour and environmental standards. It would therefore be worthwhile to remain at least cautious about their correctness under the viewpoint of international standards until such a contract is actually examined properly²³.

Furthermore, it is not known if in some cases the contracts based on the Angola-Model amount to a kind of *de facto* preferential access to the African market for Chinese companies. If that were the case, a number of norms and principles of international economic law became relevant for the legal examination of the contracts: the principle of MFN²⁴ and the prohibition of export subsidies²⁵. In order to achieve transparency, a concerned third country might perhaps notify the WTO committees or bring a WTO case against the African country for the contracting of Chinese companies based on the Angola-Model²⁶.

Finally, it remains open whether or not the contracts meet the formal requirements for state treaties imposed by the Vienna Convention on the Law of Treaties. In particular, the following norms are of interest in the context of the Angola-Model based loan agreements: observance of obligations independently from a treaty (VCLT 43), absence of consent procured through corruption (VCLT 50), fundamental change of circumstances (VCLT 62), registration and publication of treaties (VCLT 80), and the norms on the conclusion and entry into force of treaties (VCLT Part II).

In addition, due to the public nature of such a contract, the consequences of a breach of contract are different to the ones in private law (VCLT 60)²⁷. A potential breach of contract would not be brought to a national court, but would typically have to be resolved via additional negotiations and measures between the parties or in an international court. Lastly, the fact that such a contract would fall under public international law weakens the legal protection of investments and properties through bilateral investment protection agreements, as a consequence of the hierarchy of the relevant legal texts²⁸. Given the vast number of such agreements China holds on the African continent, this categorization would certainly not be in the interest of China.

²³ Chinese companies on the African continent have repeatedly been criticised for ignoring labour standards, polluting and not respecting standards for the protection of the environment, and for violating human rights standards. However, it has to be noted that these issues are not restricted to Chinese companies, but are a matter of concern in relation to MNCs in general.

²⁴ GATS II and GATS V, GATT I and GATT XXIV.

²⁵ The requirement to have 50 percent of the projects’ and assignments’ procurement from China is likely to violate the provisions of the Agreement on Subsidies and Countervailing Measures (SCM III).

²⁶ cf. GATT XXIII and Agreement on Rules and Procedures Governing the Settlement of Disputes (DSU).

²⁷ See also literature on state responsibility, e.g. DOMINICÉ, C. (1999).

²⁸ cf. KOSKENNIEMI, M. (1997).

4.3 Implications for the Legal Body of International Economic Law

The legal concerns relating to the Angola-Model style of tied aid could be solved if the framework treaties and everything else attached to the Angola-Model were publicly available and could be studied by policy-makers and scholars. However, as long as they are not publicly available, they pose a threat to the legal body of international trade law, as it is uncertain whether or not they comply with all the rules that the countries involved in Angola-Model agreements have committed themselves to. Therefore, the first and foremost requirement must be for more transparency in the interest of the international body of trade law. Such transparency could provide the basis for mutual trust and for a general discussion on the regulation of tied aid in the interest of developing countries.

If, as has been the case just recently with China offering financial help to member states of the European Union, the West and the general public opinion condemns the strategy of China on the African continent²⁹, it should be considered that the Angola-Model is very similar to the ‘Economic Development Agreements’ by Western countries in the 1980s³⁰. Furthermore, the weak regulations of procurement and aid in international trade and investment law are not China’s fault, particularly considering that China became only recently a member of the WTO. Thus, the final assessment of whether or not China is generous or cunning in its strategy on the African government depends much on the actual content of the treaties, the general consensus of the international community in areas of public procurement and aid, and on the results on the ground.

5. Conclusion: Open Questions Centred on Today’s Sino-African Tied Aid

This paper has outlined different legal concerns related to the Angola-Model. As a consequence of these uncertainties, it has been suggested to strengthen the rules on transparency of international treaties related to trade and investment, including aid and public procurement, and to further develop the regulations in these areas on the global level in the interest of fair competition.

Nevertheless, despite the considerable lack of legal security concerning the provisions governing tied aid arrangements, the legal analysis indicates that the Angola Model does not seem to stand in violation of international trade law. If the space for legal interpretation and application of the relevant provisions in international law is used for sustainable investments and policies, the criticised lack of legal security – particular with reference to the overall coherence of the international body of trade law – can also be seen as an advantage for individual receiving countries: The economic support provided by China is relatively free from constraining requirements such as e.g. standards with regards to labour, environment, human rights, as well as political and social conditions that have to be met by the

²⁹ cf. HOFMANN, K. (2006); see also press coverage of China’s recent investments in Greece and Portugal, e.g. the Telegraph: <http://www.telegraph.co.uk/news/worldnews/europe/greece/7869999/Chinas-new-Silk-Road-into-Europe.html> [Online].

³⁰ cf. PAASIVIRTA, E. (1990).

host country. Additionally, there is a potential dormant in state barter-trading of accessing efficient and immediate development support from a strong partner, accelerating economic growth in the entire country. Insofar, the China has the means to choose between the roles of the cunning fox or the wise dragon.

5.1 Does *de facto* Market Access Matter for the WTO?

To date, not a single Economic Partnership Agreement, Free Trade Agreement or Preferential Trade Agreement between China and an African country exists. Yet, two-way trade between China and Africa has seen a fifty-fold increase in the years 1999 to 2008³¹. In addition, China became the second most important trading partner for the African economy and is probable about to overtake the US, Africa's most important trading partner today³². Interestingly, the increase of Chinese exports to African countries is particularly high in the countries that have an Angola-Model related agreement with the Chinese government³³.

Based on these simple facts, one can argue that regulation and legal consideration of *de facto* market access matters not only in the interest of the coherence of international trade law, but also in the interest of competing economies. This is certainly an aspect of tied aid arrangements, which the WTO will have to debate in the nearer future.

5.2 How to Distinguish the Legal Character of Contracts related to Tied Aid?

This paper has been concerned with the legal character of agreements related to the tied aid under the Angola-Model. A final analysis was not possible because the agreements are not publicly available. But even if they were accessible for the public, the distinction between the spheres of public and private would still present a problem: How far does the public character of a state-treaty that enables tied aid and defines the terms and conditions for aid reach? If a state-treaty names the assignments, the companies and working conditions in the context of tied aid, do they still belong to the sphere of private law or is there a mix of different legal bodies in place?

This distinction becomes particularly difficult in the case of state-owned Chinese MNCs that officially pursue the strategy of the Chinese government. These MNCs, as has been argued before, could be considered as a part of the Chinese state and their contracts would, thus, also belong to the sphere of public law. But, does the international community want that MNCs become a subject of international law and what would be the consequences of such an upgrading? However, is it still possible, given the current realities of ownership particularly in the case of Chinese MNCs, to allocate them to the sphere of private law?

³¹ IDE-JETRO (2009), p. 16.

³² BBC even claims that China already has overtaken the US and was Africa's largest trading partner by December 2010: <http://www.bbc.co.uk/news/world-asia-pacific-12069624> [Online].

³³ cf. IDE-JETRO (2009).

Finding an answer to these issues would not only help to solve many of today's grey areas of international law related to the ever more powerful MNCs in general, but would also contribute to the coherence in the international trade law.

5.3 How to best Deal with Competition-Distortions based on Tied Aid?

Finally, this paper has identified distortions in competition related to the Angola-Model. These distortions are mainly based on the lack of procurement-procedures, the requirement to buy Chinese procurement-material, and the bundling together of various procurement-projects together with oil-concessions and other rights. In this way, competition in parts of the services sector, as well as in the entire public procurement is more or less dead.

Competition-distortions related to tied aid might be impossible to avoid completely, as the system of tied aid – which is in fact favourable for developing countries – builds on the possibility of the host state to grant the lending state some kind of preference. Thus, the problem for the international legal system of trade law is not mainly the existence of distortions in competition related to tied aid, but that these distortions are not yet regulated or addressed in a coherent way. Addressing them in the GPA or in a future Chapter in both the GATT and the GATS would contribute to the creation of mutual trust and more transparency in the international trading system.

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